

**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**Appeal from the Court of Appeals  
Sawyer, P.J., Saad and Meter, JJ.**

**HAROLD HUNTER JR.,  
Plaintiff-Appellant,**

**-v-**

**Docket No 147335**

**DAVID SISCO and  
AUTO CLUB INSURANCE ASSOCIATION,  
Defendants,  
and**

**CITY OF FLINT,  
Defendant-Appellee.**

---

**BRIEF ON APPEAL--APPELLANT**

**\* \* \* ORAL ARGUMENT REQUESTED \* \* \***

**Submitted by:**

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## STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This appeal on leave granted arises from an application seeking plenary review of an April 2, 2013 decision of the Court of Appeals (Apx 10a), as to which reconsideration was denied by order of May 21, 2013 (Apx 19a). This Court has appellate jurisdiction pursuant to Const 1963, art 6, §4 and MCR 7.301(A)(2), and the appeal is timely filed in accordance with MCR 7.302(C)(2)(c). Leave to appeal was granted by order of March 21, 2014

The jurisdiction of the Court of Appeals is provided by law, and its practice and procedure are prescribed by the court rules. Const. 1963, art 6, §10. The Legislature has established this Court's jurisdiction over appeals of right by limiting same to those from "final orders" of the circuit and other courts. MCL 600.308(1). Plaintiff-Appellant disputes the Court of Appeals' exercise of jurisdiction over this matter as an appeal of right.

This Court has purported to define for the Legislature, without any delegation of authority to do so, the meaning of "final order". See MCR 7.202(6) and 7.203(A). To the extent this Court has created new definitions of the statutory terminology unsupported by legislative use of such language, MCL 8.3a, its rules are in excess of its constitutional authority. Const 1963, art 3, §2; *McDougall v Schanz*, 461 15, 30-31; 597 NW2d 148 (1999). Unlike the Supreme Court or the circuit court, the jurisdiction of the Court of Appeals is "entirely statutory," *People v Milton*, 393 Mich 234, 245; 224 NW2d 266 (1974), and is generally limited to final judgments and orders. MCL 600.308. An order denying summary disposition, on any basis, is by definition not a "final judgment", and this Court is without constitutional authority to redefine the statutory terminology, still less in such a manner as to pervert the words of the statute beyond recognition. *People v Mallory*, 378 Mich 538, 474 n 4; 147 NW2d 66 (1967) (Souris, J., concurring); *WPW*

*Acquisition Co v City of Troy*, 466 Mich 117, 123; 643 NW2d 564 (2002), quoting *Michigan Coalition of State Employee Unions v Civil Service Comm’n*, 465 Mich 212, 223; 634 NW2d 692 (2001) for the principle that “if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended.” The same limitations preclude this Court from creating definitions of statutory phraseology that is a “technical legal term or a phrase of art in the law” differently than it was understood by the Legislature at the time of enactment. MCL 8.3a.

Therefore, the City of Flint had no appeal of right whatsoever in this matter, with respect to any aspect of the case, from a purely interlocutory order. The City had to seek leave to appeal. MCL 600.308(2)(e) in order to obtain appellate review.

But, in any event, even assuming *arguendo* that MCR 7.202(6)(a)(v) validly permits an appeal of right from an order denying summary disposition on grounds of governmental immunity, this Court has limited such appeal as of right “to the portion of the order with respect to which there is an appeal of right”. The City of Flint purported to raise, as its Issue II on appeal, a challenge to denial of summary disposition with respect to the no fault threshold for tort liability, MCL 500.3135(2), which has nothing whatsoever to do with governmental immunity. The Court of Appeals therefore had no jurisdiction over the no fault threshold issue, even if it believed it had jurisdiction to address a governmental immunity question. See *Costa v Community Emergency Medical Services, Inc*, 283 Mich App 572, 583; 689 NW2d 712 (2004), where the Court accurately observed:

MCR 7.203(A)(1) explicitly prescribes the scope of an appellant’s appeal as of right from a final order under MCR 7.202(6)(a)(iii)-(v), such as an order denying summary disposition on the issue of governmental immunity, and limits an appellant’s right to

appeal under these circumstances “to the portion of the order with respect to which there is an appeal as of right.” \* \* \*

The evidentiary issue as to the sufficiency of plaintiff’s proofs of injuries in relation to the no fault tort liability threshold under MCL 500.3135(1) was thus outside the jurisdiction of the Court of Appeals on this appeal—the City *could* have filed an application for leave to appeal that aspect of the circuit court’s order (which, one supposes, might have been granted merely to promote judicial efficiency, given the pendency of the City’s appeal of right, without insisting on a threshold showing of merit as would usually be requisite), but it opted not to do so. That aspect of the City’s appeal should therefore have been dismissed—“[w]hen a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void”. *Fox v Bd of Regents of Univ of Mich*, 375 Mich 238, 242; 134 NW2d 146 (1965). Indeed, all courts, at all times, *sua sponte* question their personal and subject matter jurisdiction as well as jurisdictional limits on the relief they may provide. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999); *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005). This Court has long abjured against appellate courts entertaining appeals which can only be brought by leave, as least in the absence of a proper and timely application. As held in *Halkes v Douglas and Lomason Co*, 267 Mich 600, 602; 255 NW 343 (1934) (boldfaced emphasis added):

Upon argument here, the question of the trial court’s jurisdiction sitting in equity was raised *sua sponte*. In *Lamberton v Pawloski*, 248 Mich 330; 227 NW 801, we questioned, on our own motion, the propriety of the trial court’s acquiescence in a stipulation that it determine an issue already pending in an action of ejectment, where jurisdiction was obtained by a bill to quiet title. In that case the decree below was affirmed by a divided court. It is most desirable that any uncertainty as to the right to confer equitable jurisdiction by stipulation be removed.

If the claims had been asserted in separate suits at law, none of them could have been appealed to this court without leave. Rule 60, Michigan Court Rules; section 15491, CL 1929. At least fifteen of them could not have been appealed from the common pleas court

of the city of Detroit to the circuit court without leave. Act 475, Local Acts 1903; section 16372, CL 1929; and Rule 76, §6. **We are unwilling to place the stamp of approval on a practice that will permit any two or more groups of litigants to invoke the aid of the equity court by the will or wish of the parties.** As stated in Justice Potter's opinion in *Lamberton v. Pawloski, supra*, jurisdiction of the subject-matter is governed by law and cannot be conferred by consent, and it is the duty of the court to raise the question of jurisdiction on its own motion.

Equity has jurisdiction to avoid a multiplicity of suits, but as stated by Justice Fead in *Salisbury v City of Detroit*, 258 Mich 235; 241 NW 888, 889: 'The existence of a number of independent actions at law does not constitute the multiplicity of suits which confers equitable jurisdiction,' citing *Youngblood v Sexton*, 32 Mich 406; 20 Am Rep 654.

The decree is reversed, and **the bill of complaint is dismissed**, without costs.

Here, likewise, the City's appeal should have been dismissed at least with regard to the no fault issue (and should also have been rejected as to the governmental immunity issue), without prejudice to seeking appeal by leave to the Court of Appeals.

## STATEMENT OF QUESTIONS PRESENTED

**Issue I: Where negligent operation of a municipally-owned motor vehicle results in physical injury, are non-economic damages for pain and suffering, mental and emotional distress, etc. recoverable under MCL 691.1405 as “bodily injury”?**

Plaintiff-appellant answers “yes”.

The circuit court answered “yes”.

The Court of Appeals answered “no”.

The City of Flint answers “no”.

## STATEMENT OF FACTS

Harold Hunter, plaintiff-appellant, appeals by leave granted (Apx \_a) an April 2, 2013 *published* decision of the Court of Appeals (Apx 10a-17a), 300 Mich App 229; 832 NW2d 753, as to which a timely motion for reconsideration was denied by order of May 21, 2013 (Apx 18a).

This personal injury action arises from a vehicular collision between a truck owned by the City of Flint and operated by a city employee and plaintiff Harold Hunter's automobile. In the Court of Appeals, the City of Flint was the appellant. The City claimed an appeal of an August 23, 2011 order of the Genesee circuit court (Apx 9a), Hon. Joseph Farah presiding, denying summary disposition predicated on governmental immunity "for the reasons stated on the record" on August 15 2011 (Apx 241a-263a), and then on the City's supposed appeal of right<sup>1</sup>, it also challenged whether plaintiff Harold Hunter's injuries surmount the no-fault threshold for tort liability (an issue on which leave was not granted and which will not be further addressed).

### A. Legal Principles Governing this Statement of Facts

Because the City's issues each arise from denial of summary disposition, this Court on appeal is properly concerned, not with the possible weight of the evidence (no such issue could properly be presented), but with the mere existence of evidence which, when viewed in a light

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<sup>1</sup> The March 21, 2014 order granting leave to appeal is limited "to whether damages for pain and suffering and/or emotional distress may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008))." Accordingly, in obedience to the express circumscriptions of that order, although plaintiff continues to dispute the propriety and scope of the City's claim of appeal (as plaintiff did in the Court of Appeals and his Jurisdictional Statement above), and notwithstanding that jurisdictional questions are in theory always open to argument and even a mandatory subject of *sua sponte* consideration, *Fox v Bd of Regents, Univ of Mich*, 375 Mich 238, 242; 134 NW2d 146 (1965), citing *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939), plaintiff will not further address the point. See also footnote 3 below.

most favorable to plaintiff as the non-moving party, would permit a rational trier of fact to sustain plaintiff's claims. On motion for summary disposition, the facts are to be viewed in a light most favorable to the non-moving party. *Dubuc v El-Magrabi*, 489 Mich 869; 795 NW2d 593 (2011)<sup>2</sup>; *In re Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Accordingly, this statement of facts will focus on the evidence which supports the trial court's rulings, since at trial a jury (or the judge in a bench trial) will be free to disregard all other evidence, even if opposed by seemingly viable contrary evidence. As held in *People v Jackson*, 390 Mich 621, 625 n. 2; 212 NW2d 918 (1973):

As stated in *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457, 458 (1881), 'a jury may disbelieve the most positive evidence, even when it stands uncontradicted.' Similarly, see *Crampton v Crampton*, 205 Mich 233, 241; 171 NW 457 (1919); *Cuttle v Concordia Mutual Fire Ins Co*, 295 Mich 514, 519; 295 NW 246 (1940); *Hughes v John Hancock Mutual Life Insurance Co.*, 351 Mich 302, 308; 88 NW2d 557 (1958); *Baumgartner v Ham*, 374 Mich 169, 174; 132 NW2d 159 (1965); *Wolfgang v Valko*, 375 Mich 421, 435; 134 NW2d 649 (1965). Even in a case where there is no issue of credibility and no showing of interest on the part of the witnesses, the question does not become one of law and still is to be decided by the trier of fact where the evidence relied on is contradicted 'by any testimony given in the case \* \* \* or by any facts or circumstances in the case,' or where the evidence relied on is 'in any way improbable or discredited' or any legitimate inference may be drawn inconsistent with a finding or verdict directed as a matter of law. *Boudeman v Arnold*, 200 Mich 162, 164; 166 NW 985, 986, 8 ALR 789 (1918). Similarly, see *Hagan v Chicago, D & CGTJR Co*, 86 Mich 615; 49 NW 509 (1891); *Kaminski v Grand Trunk WR Co*, 347 Mich 417, 428; 79 NW2d 899 (1956); *Green v Detroit U R*, 210 Mich 119, 125; 177 NW 263 (1920).

Where the facts viewed in a light most favorable to plaintiff support the claim, it is for a jury (as here demanded) to resolve any dispute, even as to governmental immunity. See *Guider v Smith*, 431 Mich 559, 572; 431 NW2d 810 (1988) as interpreted in *Petitpren v Jaskowski*, 494 Mich 190, 201 n. 20; 833 NW2d 247 (2013), where this Court noted that "a case should proceed

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<sup>2</sup> "When the complaint allegations are viewed in a light most favorable to the plaintiff, she did allege an unjustified instigation of the breach by the defendants. The Court of Appeals erred when it concluded, as a matter of law, that the defendants were motivated by a legitimate business interest, which, in this case, was a determination to be made by the jury."

to trial if there is a question of fact that would affect the availability of [governmental] immunity”.

### **B. The Underlying Facts**

This matter, in its present posture, involves a negligence action against the City of Flint as a result of a July 20, 2009 automobile accident, and is brought under the motor vehicle exception to governmental immunity, MCL 691.1405. Plaintiff seeks non-economic damages—including those for mental and emotional distress—arising in connection with physical injuries above the no-fault tort threshold, MCL 500.3135(1)<sup>3</sup>.

On July 20, 2010, Mr. Hunter, operating a Pontiac G6 registered to his mother, was travelling on westbound Crestbrook Avenue, Flint, when a City-owned<sup>4</sup> dump truck driven by David Sisco, proceeding eastbound on Crestbrook, attempted to maneuver around a vehicle parked in the eastbound lane. The dump truck crossed the center line and sideswiped Mr. Hunter’s automobile. According to the police report (Apx 63a-64a), at the time of impact, it was broad daylight, the weather was clear, the road was dry, and there were no special conditions extant. The reporting police officer also reported that “veh #1 [dump truck] found at fault.” *Id.*

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<sup>3</sup> An issue raised by the City in its appeal to the Court of Appeals concerned whether plaintiff’s injuries surmount the no fault tort threshold, MCL 500.3135. The March 21, 2014 order granting leave to appeal (Apx 264a) again limits plenary consideration to only the application of MCL 691.1405, and thus excludes from further consideration the no fault question. Perhaps this explains why the Court correlatively directed that the jurisdictional issues (see footnote 1 above), which substantially concern the propriety of raising a no fault issue on a claim of appeal predicated on MCR 7.202(6)(a)(v), also not be further addressed.

<sup>4</sup> Per Exhibit A to Plaintiff’s Brief in Response to Defendants City of Flint and David Sisco’s Motion for Summary Disposition (Apx 65a), a copy of motor vehicle registration information provided by the City during discovery, the dump truck was registered to “City of Flint Transportation Dept.”, but that is merely one agency within the City and not a separate juristic entity. *Omelenchuk v City of Warren*, 466 Mich 524, 526 n. 3; 647 NW2d 493 (2002); see also *Bayer v Almstadt*, 29 Mich App 171, 180; 185 NW2d 40 (1970). The City is thus the proper defendant, and does not itself contend otherwise.

According to plaintiff's deposition testimony, the impact "was like a jerk, a violent jerking, and it just jerked my body real hard." (Apx 84a). As a result of the collision, the front wheel of plaintiff's Pontiac was shredded and the rear quarter panel was crushed (Apx 85a); thus, the car had to be towed—it was not drivable (Apx 92a). Repairs included replacing the rear quarter panel, rear car door, one rim, one tire, and fixing the rear axle (Apx 93a).

Immediately after the accident, Mr. Hunter was taken to Hurley Medical Center's Emergency Room, where he complained of low back pain. On arrival at the ER, he reported bilateral lower back pain; his pain was recorded as "sharp" and scored as 6 out of 10. In the ER, he was administered 30 mg of Toradol<sup>®5</sup> at 5:00 p.m. He was diagnosed with "low back pain" (also reported as "lumbar strain" on another form) and discharged with two prescriptions for pain medication: Motrin 600 mg #20 and Flexaril 10 mg #20. There was also a recommendation for follow up treatment (unspecified). (Apx 65a-79a).

However, plaintiff discontinued the medications due to the expense, despite finding it harder and harder just to get out of bed each morning (Apx 85a). Consequently, plaintiff went to the Mundy Pain Clinic, where he treated until January, 2011 (*id*). His treatment, which was initially three times each week (Apx 86a), included physical therapy as well as electronic stimulation of the neck and lower back, massages and heat treatments, but at the end plaintiff was told he should look into some type of neurosurgical treatment (Apx 85a-86a), apparently to repair his herniated disc (see below). His pain medications then included flexiril<sup>®</sup>, vicodin<sup>®</sup> and xanax<sup>®</sup> (Apx 86a).

Prior to the accident, plaintiff had been in excellent health, and had not had reason to see a doctor for over a year, or visit a hospital for at least 5 years (Apx 87a). Eventually, plaintiff's

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<sup>5</sup> Chemical name ketorolac tromethamine, a short term medication for severe pain pharmacologically classified within the pyrrolo-pyrrole group of NSAIDs.

neck and mid-back problems were resolved; it was the low back that caused him the most pain (Apx 87a). Plaintiff began applying for available work but has not obtained employment (Apx 87a). Plaintiff appears to have sufficient college credits for a bachelor's degree in English (and teaching) from the University of Arkansas at Pine Bluff, but has not been back to Arkansas since his divorce (Apx 88a).

Due to his injuries, plaintiff needed other people to help him do things around the house for several months, including running errands, driving plaintiff and his son to activities, shopping, mowing the lawn, raking leaves, laundry, cooking, and cleaning (Apx 86a, 207a-240a). Prior to the accident, plaintiff had been employed as a custodian in a barber or beauty shop (Apx 85a), but he was replaced when he could not work (Apx 88a). Subsequently, he was on a medically-imposed five pound lifting restriction, and likewise told not to work (Apx 86a).

Plaintiff's MRI examination on March 13, 2010 produced a differential diagnosis of "2. Disc herniation at L4-L5 in the midline and focally in the right paramedian location without spinal stenosis" and "3. Element of epidural lipomatosis surrounding the thecal sac at L5 and S1 level." (Apx 100a, 150a-151a). An EMG performed on April 16, 2010 produced a finding of "1. Bilateral L5 radiculopathy" (Apx 102a).

As for "normal activities"—see MCL 500.3135(5)—post-accident plaintiff could not perform any of the recreational activities he enjoyed pre-accident, including spending time with his young son, and mentoring youth softball and basketball teams (Apx 95a).

### **C. Errors and Omissions in the City's Summary of the Facts for the Court of Appeals**

Per MCR 7.212(D)(3)(b), the Harold Hunter, as appellee, was required to identify errors and omissions in the City's statement of facts, as a prelude to then propounding his own counterstatement. In the Court of Appeals, the City's brief contained the following glaring errors

(of which several were gross misrepresentations of documents on which the City itself relied) and omissions, among many of lesser degree:

- The City asserted as fact that "Plaintiff saw the City of Flint vehicle coming at him but did not attempt to avoid it until it was too late." Aside from the manifestly obvious point that the City's driver equally saw plaintiff's vehicle, it was the City vehicle that crossed the center line in violation of MCL 257.634(b), under which statute plaintiff had the right-of-way and Mr. Sisco (the City's driver-employee) was required to yield. Moreover, plaintiff had moved as far to the right of his lane as was possible and slowed when he saw the dump truck begin to cross the center line (Apx 84a);
- The City posited as fact that "Plaintiff first received an EMG on February 12, 2010 which showed no damage to his back \* \* \*" However, the City's own exhibit, a copy of the Feb. 12, 2010 EMG report<sup>6</sup> (Apx 38a-39a), includes the following crucially important qualifier (boldfaced emphasis added):

"3. Normal EMG findings **do not exclude a clinical diagnosis of radiculopathy**, but would only indicate that there has been no major motor nerve root compromise in the course of the patient's symptoms or if it is too mild **or too early for EMG findings to develop.**"

Thus, it is not grounds for dubiety, as the City urged, that "a subsequent MRI and EMG showed a midline herniation of his disc in the lumbar region," as the City acknowledges in the remainder of the initially-quoted sentence. In any case, a trier of fact could accept Harold Hunter's evidence, and the City's contentions go to the weight of the evidence

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<sup>6</sup> Of course, an EMG (ElectroMyoGraph), which merely measures electrical activity of skeletal muscles, would not be the proper methodology for differential diagnosis of a herniated disc. X-ray, CAT, or MRI, all of which allow for visualization of internal organs and structures to varying degrees, would be the appropriate means of definitively identifying a herniated disc.

and are for the trier of fact, and thus outside the proper scope of a motion for summary disposition.

- The City omitted to mention that the same February 12, 2010 EMG report (Apx 38a-39a) included the following important finding: “4. The patient appears to have bilateral sacroiliac joint inflammation and may benefit from injections.”
- The City utterly failed to address the reasons given by the trial judge for his ruling (Apx 251a and 262a).

#### **D. Case Chronology**

Plaintiff filed suit in July, 2010 in Genesee circuit court, alleging negligence in the operation of a municipally-owned motor vehicle (the City’s dump truck). After discovery, the City filed its motion for summary disposition under MCR 2.116(C)(7) and (10) on or about July 14, 2011, asserting both governmental immunity and that plaintiff’s injuries do not surmount the no fault threshold for tort liability<sup>7</sup>.

Plaintiff through counsel timely answered the city’s motion on August 8, 2011, providing supporting documentary evidence (consisting of the police report of the accident (Apx 63a-64a), the Hurley Medical Center’s ER records (Apx 67a 79a), the complete transcript of plaintiff’s February 10, 2011 deposition (Apx 81a-97a), medical records from Biomagnetic Resonance Imaging Centers (Apx 99a-100a) and Mundy Pain Clinic (Apx 104a-206a), additional records including Disability Certificates and medical appointment information (Apx 208a-231a), and Certificates of Services Rendered by Charmayne Cubine (Apx 232a-240a).

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<sup>7</sup> Defendant Sisco, the driver of the dump truck and a City employee, was (in the same order of August 23, 2011) granted summary disposition on grounds he was not guilty of gross negligence, MCL 691.1407(2)(c). No issue concerning Sisco’s personal liability has been raised by either party in this appeal (although plaintiff’s right of cross-appeal, if any, is unclear when a governmental defendant claims appeal under MCR 7.202(6)(a)(v); plaintiff thus has reserved his right of appeal until a “true” final judgment is entered).

Oral argument was presented on August 15, 2011. As for governmental immunity, Judge Farah rejected the City's argument that under the motor vehicle exception, MCL 691.1405, which limits liability to "bodily injury or property damage", plaintiff cannot recover for pain and suffering or similar mental or emotional components of his injuries (Apx 251a):

All right. I see your point. I disagree with it, but I see it.

I think the nomenclature of bodily injury also encompasses and embraces pain and suffering associated with the bodily injury suffered by the person in the accident or occurrence. I believe my decision is consistent with *Wesche*[v *Mecosta Co Rd Comm'n*, 480 Mich 75, 84-85; 746 NW2d 847 (2008)] in that I believe *Wesche* drew the line as to who could recover for what. And since pain and suffering was never contemplated or even in the issue on which they granted leave, I think it's limited to loss of consortium claims.

So, on that aspect of the motion, the motion will be denied. \* \* \*

As for no fault liability, the trial court also expressed dubiety at the City's "prognostication" that a change in personnel at the Michigan Supreme Court<sup>8</sup> would supplant the current standard [*McCormick v Carrier*, 487 Mich 180, 202-203; 795 NW2d 517 (2010)] for assessing whether injuries surmount the no fault tort threshold, MCL 500.3135(1) (Apx 260a-261a), and rejected the City's contention that, because plaintiff's custodial employment paid him "under the table" he had no compensable "legal income" (Apx 258a-259a)—the trial court noted that the no fault act refers only to "income" (Apx 261a-262a). The trial court also found unconvincing the City's contention that plaintiff's "advanced age" of 40 years in essence allows judicial notice that his back problems are a normal part of the aging process rather than the consequence of the subject motor vehicle accident (Apx 255a-256a).

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<sup>8</sup> The City in argument thought that the accession to this Court of Justice Mary Beth Kelly, replacing the Hon. Elizabeth Weaver, might result in the overruling of *McCormick*. To date, at least, the City remains disappointed in this expectation. See *Brown v Blouir*, 489 Mich 959; 798 NW2d 754 (2011).

In the end, the trial judge opined, “You’ve convinced me. \* \* \* I think there’s a factual issue on both the causation and on the impairment question as far as impact on his life. But I will tell you, I’m only denying it because I have to do things in the light most favorable to plaintiff. \* \* \*” (Apx 262a) The City’s motion was then denied by order of August 23, 2011 “for the reasons stated on the record” (Apx 9a).

#### **E. The Court of Appeals’ ruling**

The City then filed a claim of appeal, relying on MCR 7.202(6)(a)(v) to assert a right of appeal from an interlocutory order. Following briefing and oral argument (in the interim, plaintiff’s motion to affirm was denied), the Court of Appeals affirmed in part and reversed in part in a published decision (Apx 10a-17a). Discussing the issue on which leave has here been granted, the Court of Appeals opined (Apx 13a-16a):

In his complaint, plaintiff claimed he sustained injuries for “shock and emotional damage” as well as pain and suffering. Plaintiff also testified that he felt stress and disappointment that he cannot provide for his son as he had in the past and could not participate in certain activities he did before his injury. As discussed below, we hold that such damages are precluded under MCL 691.1405 because a government agency may only be liable for “bodily injury” and “property damage.”

The trial court ruled that “bodily injury” encompasses emotional damages of the kind claimed by plaintiff. Thus, at issue is the scope and meaning of “bodily injury” in MCL 691.1405. As our Supreme Court explained in *Wesche v Mecosta County Road Comm’n*, 480 Mich 75, 84; 746 NW2d 847 (2008):

This [statute] is clear: it imposes liability for “bodily injury” and “property damage” resulting from a governmental employee’s negligent operation of a government-owned motor vehicle. The waiver of immunity is limited to two categories of damage: bodily injury and property damage.

In *Wesche*, our Supreme Court considered the meaning of “bodily injury” for purposes of the motor vehicle exception and opined:

Although the GTLA does not define “bodily injury,” the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). The word “bodily” means “of

or pertaining to the body” or “corporeal or material, as contrasted with spiritual or mental.” *Random House Webster’s College Dictionary* (2000). The word “injury” refers to “harm or damage done or sustained, [especially] bodily harm.” *Id.* Thus, “bodily injury” simply means a physical or corporeal injury to the body. [*Id.* at 84-85.]

Thus, pursuant to *Wesche*, defendant’s immunity is waived only for claims of “physical or corporeal injury to the body.” *Id.* at 85. And the Court in *Wesche* made clear that the limitation on the waiver of immunity to “bodily injury” pertains even if a plaintiff seeks damages for other injuries after also meeting the requirement of proving a “bodily injury.” As the Court explained, MCL 691.1405 limits recovery to bodily injury or property damage and “does not state or suggest that governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury or property damage.” *Id.* at 85-86 (emphasis in original). Had the Legislature intended to simply create a threshold which, once established, would permit noneconomic or emotional damages, it would have done so explicitly and, in the motor vehicle exception, it did not. *Id.* at 86. In so holding, the Court in *Wesche* rejected the rationale of *Kik v Sbraccia*, 268 Mich App 690, 709-710; 708 NW2d 766 (2005), that, in the motor vehicle exception, the Legislature intended to permit damages for something more than physical harm, including pain and suffering damages, so long as a threshold of “bodily injury” is met. *Wesche*, 480 Mich at 85-86.

The holding in *Wesche* also comports with case law and our rules of statutory construction. Indeed, our jurisprudence interpreting and applying the GTLA instructs that no expansive reading of the motor vehicle exception is appropriate or permitted. “The immunity from tort liability provided by the governmental immunity act is expressed in the broadest possible language; it extends to all governmental agencies and applies to all tort liability when governmental agencies are engaged in the exercise or discharge of governmental functions.” *McLean v McElhaney*, 289 Mich App 592, 598; 798 NW2d 29 (2010), citing *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). Thus, as recognized by the Court in *Wesche*, the immunity conferred to defendant here is broad. In contrast, because the Legislature clearly intended to limit the exposure of governmental entities to tort litigation, the small number of exceptions to that immunity must be read and construed narrowly, as in *Wesche*. *Nawrocki*, 463 Mich at 149.

As discussed, “[t]he primary objective in construing a statute is to ascertain and give effect to the Legislature’s intent.” *McLean*, 289 Mich App at 597-598. MCL 8.3 provides that, “[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.” Accordingly, we are bound to follow the Legislature’s further directive that, “[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.” MCL 8.3a.

Again, if given, the definition in a statute controls, and “bodily injury” is undefined in MCL 691.1405. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Unquestionably, “bodily injury” could be considered a term of art that has acquired a unique legal meaning in our jurisprudence and, in such cases, “[i]t is presumed that the Legislature in using a term which has a well defined meaning at the time of a legislative enactment intended that meaning to be employed.” *Paprocki v Jackson Cty Clerk*, 142 Mich App 785, 791; 371 NW2d 450 (1985). The meaning of “bodily injury,” and the differences among claims for “bodily injury,” “personal injury” and emotional or psychological injuries are manifest in our case law. In criminal cases, our courts have clearly defined “bodily injury” to mean a physical damage to a person’s body. *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004) (citing MCL 777.33(1)). Our courts have interpreted coverage for “bodily injury” in insurance policies as not encompassing those for mental suffering unless there exists some physical manifestation of the mental suffering which, even were it applicable, is clearly lacking here. See *State Farm Fire and Cas Co v Basham*, 206 Mich App 240, 243; 520 NW2d 713 (1994), citing *Nat’l Ben Franklin Ins Co of Michigan v Harris*, 161 Mich App 86, 90; 409 NW2d 733 (1987) and *Farm Bureau Mutual Ins Co of Michigan v Hoag*, 136 Mich App 326, 332, 335; 356 NW2d 630 (1984). In *State Farm Mut Auto Ins Co v Descheemaeker*, 178 Mich App 729; 444 NW2d 153 (1989), this Court explained that, when a policy defines “bodily injury” as “‘bodily injury to a person and sickness, disease or death which results from it,’” it is “unambiguous and has been understood as contemplating ‘actual physical harm or damage to a human body.’” *Id.* at 732, quoting *Hoag*, 136 Mich App at 334-335.

Nonphysical injuries, such as humiliation and mental anguish, that lack any physical manifestations do not constitute a “bodily injury.” *Hoag*, 136 Mich App at 335; *Harris*, 161 Mich App at 89. Therefore, it follows that other nonphysical injuries, such as a loss of consortium, society and companionship, which lack any physical manifestations, are also not bodily injuries.

In considering the meaning of an undefined term of art it is also appropriate to consult a legal dictionary for guidance and to consider its meaning as developed at common law. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295, 301 (2010). As the Court recognized in *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 56; 760 NW2d 811 (2008), “Black’s Law Dictionary (7th ed), p 789 . . . defines ‘bodily injury’ as ‘[p]hysical damage to a person’s body.’” See also Black’s Law Dictionary (9th ed), p 856.<sup>2</sup> In contrast, Black’s defines “personal injury” to include “mental suffering,” which is also in keeping with our case law. *Id.* at 857. As set forth in *Alfieri v Bertorelli*, 295 Mich App 189, 198; 813 NW2d 772 (2012), “the modern definition of ‘personal injury’ [refers] to any invasion of a personal right, not only bodily injuries. Black’s Law Dictionary (9th ed.).” Further, “[i]n the tort context, an ‘injury’ is generally understood to mean ‘[a]ny wrong or damage done to another, either in his person, rights, reputation, or property.’ Black’s Law Dictionary (6th ed.), p. 785.” *Karpinsky v Saint John Hospital-Macomb Center Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999). Thus, it is clear from myriad cases and lay and legal resources that, if the Legislature wanted to permit plaintiffs to recover damages for pain and suffering or emotional shock or stress within the motor vehicle

exception, it could have done so by providing for “personal injury” or emotional damages in the statute. See, for example MCL 600.6301; *Potter v McLeary*, 484 Mich 397, 422 n 30; 774 NW2d 1 (2009). Instead, in drafting MCL 691.1405, the Legislature chose to specifically limit the waiver of immunity to bodily injury and property damage. Thus, the *Wesche* definition of “bodily injury” is clearly correct, regardless whether we view “bodily injury” as a legal term of art or with its commonly understood meaning. Because “bodily injury” encompasses only “a physical or corporeal injury to the body,” the trial court erroneously ruled that plaintiff may recover damages for pain and suffering and “shock and emotional damage.” *Wesche*, 480 Mich at 85. Such damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.

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<sup>2</sup> However, plaintiff’s reliance on *Allen* to support his claimed damages is misplaced. In *Allen*, the Court considered whether the plaintiff suffered a brain injury in the accident and whether the brain injury constitutes a “bodily injury” under MCL 691.1405. *Allen*, 281 Mich App at 50-51. Here, while plaintiff presented evidence that he sustained a “bodily injury” to his back, his claim for emotional injuries are not recoverable for the reasons set forth in *Wesche*. Unlike in *Allen*, here, there is no evidence that plaintiff had an objectively manifested brain injury that might have caused his claimed emotional injuries. *Id.* at 59-60.

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That ruling now comes before this Court for plenary consideration on leave granted.

## ARGUMENT

**Issue I: Where negligent operation of a municipally-owned motor vehicle results in physical injury, non-economic damages for pain and suffering, mental and emotional distress, etc. are recoverable under MCL 691.1405.**

### Standard of Review

A circuit court's decision on a motion for summary disposition, whether under MCR 2.116(C)(7) or (10), is reviewed de novo. *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998) (subrule (C)(7)); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999) (subrule (C)(10)). Questions concerning interpretation of a statute, such as the governmental immunity act, MCL 691.1401 *et seq.*, present issues of law also reviewed de novo.

"MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). In reviewing a motion under MCR 2.116(C)(7), the Court accepts the factual contents of the complaint as true unless contradicted by the movant's documentation. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

When the material facts are not in dispute, this Court may decide whether a plaintiff's claim is barred by immunity as a matter of law. *Petitpren v Jaskowski*, 494 Mich 190, 201 and n. 20; 833 NW2d 247 (2013), citing *Robinson v Detroit*, 462 Mich 439, 445; 613 NW2d 307 (2000) and *Guider v Smith*, 431 Mich 559, 572; 431 NW2d 810 (1988) and "noting a case should proceed to trial if there is a question of fact that would affect the availability of immunity".

Issues of statutory construction, as questions of law, are also reviewed de novo on appeal, including those concerning governmental immunity. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013), citing *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011).

### **Issue Preservation—The City Failed to Properly Present This Issue**

While unquestionably the City raised this issue in circuit court, in the Court of Appeals the City's brief nowhere addressed the reasons given by the trial court for its ruling—explicitly entered “for the reasons stated on the record”—nor did the City even cite the transcript. The total failure of the City, as appellant, to address in its brief on appeal the basis of the trial court's decision should have barred appellate review of any issue thus implicated. *Roberts & Sons Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1991). This issue was thus not properly before the Court of Appeals.

While this Court ordinarily does not review unpreserved issues, it retains discretion to do so if the question is one of law and the facts necessary for its resolution have been presented. *McNeil v Charlevoix Co*, 484 Mich 69, 76 n. 8; 772 NW2d 18 (2009), citing *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98–99; 494 NW2d 791 (1992).

### **Legal Analysis**

**A. In construing MCL 691.1405, the judicially-created artifice whereby “governmental immunity is broadly construed, and exceptions are narrowly construed”, is wholly improper. MCL 691.1405 stands on par with, and is of equal dignity to, MCL 691.1407, being two sections of the same public act.**

On numerous occasions addressing issues arising under the GTLA (Governmental Tort Liability Act), 1964 PA 170, as amended, this Court has purported to declare that “it is a basic principle of our state's jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed.” *Maskery v Bd of Regents, Univ of Mich*, 468 Mich 609, 614; 664 NW2d 165 (2003); *Stanton v City of Battle Creek*, 466 Mich 611, 617–618; 647 NW2d 508 (2002); *Pohutski v City of Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002); *Haliw v City of Sterling Heights*, 464

Mich 297, 303; 627 NW2d 581 (2001); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998); *deSanchez v State*, 455 Mich 83, 90; 565 NW2d 358 (1997), to name just a sampling.

This notion has, more than once, been traced to the decision in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618; 363 NW2d 641 (1984). See, e.g., *Grimes v MDOT*, 475 NW2d 72, 91 n. 54; 715 NW2d 275 (2006); *Hanson v Bd of Co Rd Comm'rs of Co of Mecosta*, 465 Mich 492, 497-498; 638 NW2d 396 (2002), and *Johnson v Detroit*, 457 Mich 695, 702; 579 NW2d 895 (1998); see also *Brown v Genesee Co Bd of Comm'rs*, 464 Mich 430, 447 n. 5; 628 NW2d 471 (2001) (Markman, J, concurring). BUT ROSS SAYS NOTHING OF THE KIND; *Ross* merely states, 420 Mich at 617-618:

The fundamental problem with the “common good of all” and “essence to/of governing” definitions of “governmental function” is that they require the judiciary to make value judgments as to which activities government should be allowed to engage in without being held responsible for the unfortunate consequences thereof. This type of subjective inquiry necessarily results in legitimate difference of opinion. In contrast, the immunity from tort liability provided by §7 is expressed in the broadest possible language—it extends immunity to *all* governmental agencies for *all* tort liability *whenever* they are engaged in the exercise or discharge of a governmental function. This broad grant of immunity, when coupled with the four narrowly drawn statutory exceptions, suggests that the Legislature intended that the term “governmental function” be interpreted in a broad manner.

The Legislature's refusal to abolish completely sovereign and governmental immunity, despite this Court's recent attempts to do so, evidences a clear legislative judgment that public and private tortfeasors should be treated differently. This disparate treatment is not totally unjustifiable. \* \* \*

So *Ross* merely holds that MCL 691.1407 is broadly written; it says not a word about exceptions being narrowly written, nor does it purport to identify any authority for treating some words of the GTLA differently than others. The GTLA is not George Orwell's *Animal Farm*, where some words are “more equal than others”. Nor does *Ross*, or any subsequent decision of this Court supposedly following *Ross*' differential construct, identify any actual words in the GTLA itself

that either direct or even authorize the judiciary to construe immunity broadly and exceptions to immunity narrowly. Yet in case after case, this Court has mandated, in the most powerful and uncompromising terms, that in construing a statute, proper analysis begins with the plain language of the statute. *Malpass v Dep't of Treasury*, 494 Mich 237, 249; 833 NW2d 272 (2013); *LaGuire v Kain*, 440 Mich 367, 375; 487 NW2d 389 (1992); *Nawrocki, supra*, 463 Mich at 151 (there said without a trace of irony). As pithily iterated in *Atkins v SMART*, 492 Mich 707, 716; 822 NW2d 522 (2012):

Our primary objective when interpreting a statute is to discern the Legislature's intent. "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent....' "FN14 When the Legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted.<sup>FN15</sup>

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<sup>FN14</sup> *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

<sup>FN15</sup> *Sun Valley*, 460 Mich at 236.

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The words of a statute, as engrafted thereon by the Legislature in the exercise of its exclusive constitutional prerogatives, Const 1963, art 4, §1; see also art 3, §2, are so crucial that, again, this Court has repeatedly abjured against judicial construction that adds words to, *Davidson v Sec'y of State*, 365 Mich 162, 166; 112 NW2d 106 (1961) or, correlatively, ignores or deletes words from, those included by the Legislature. *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

The whole notion that immunity should be broadly construed and statutory exceptions narrowly interpreted thus proceeds from false premises which violate basic tenets of statutory

construction. At the outset, and contrary to *Ross*, MCL 691.1407 nowhere uses the word “all”<sup>9</sup>.

Moreover, the structure of the GTLA can be seen from the following table of contents:

- 691.1401. Definitions
- 691.1402. Repairing and maintaining highways; damages for bodily injury or damage to property; liability, procedure, and remedy as to county roads; judgment against state; payment of judgment; effect of contractual undertaking to perform work on state trunk line highway; limitations on duties of governmental agency; liability of municipal corporation
- 691.1403. Defective highways; knowledge of defect, repair, presumption
- 691.1404. Notice of injury and highway defect
- 691.1405. Government owned vehicles; liability for negligent operation
- 691.1406. Public buildings
- 691.1406a. Subrogation; contribution from joint and several tort feasons
- 691.1407. Immunity from tort liability; exceptions; judge, legislator, official, and guardian ad litem
- 691.1407c. Donation of fire control or rescue equipment by municipal corporations or organized fire departments to another municipal corporation or organized fire department; immunity from liability for damages, injury, or death caused by defect in equipment; duty to test, repair, and maintain; immunity from liability for damages, injury, or death if in compliance; worker's disability compensation rights unaffected
- 691.1408. Civil or criminal action against officer, employee, or volunteer of governmental agency; attorney; compromise and settlement; indemnification; reimbursement
- 691.1409. Liability insurance; waiver of defenses
- 691.1410. Claims against state, political subdivision or municipal corporation, procedure
- 691.1411. Limitation of actions
- 691.1412. Defenses available
- 691.1413. Proprietary function of governmental agency; limitation on actions
- 691.1414. Repealer
- 691.1415. Effective date of act
- 691.1416. Definitions; §§ 691.1417 to 691.1419
- 691.1417. Liability for sewage disposal system event; scope of liability and procedure generally; effect on common law; burden of proof of claimant
- 691.1418. Liability for sewage disposal system event; availability of economic and noneconomic damages; determination of whether individual has suffered serious impairment of body function or permanent serious disfigurement; availability of common law and statutory defenses and rights and procedures under rules of court
- 691.1419. Liability for sewage disposal system event; notice of claim and proceedings thereon; institution of civil action

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<sup>9</sup> Per *Skotak v Vic Tanny Int'l, Inc.*, 203 Mich App 616, 619; 513 NW2d 428 (1994), “all” is a word that, by definition, brooks no exceptions or exclusions, and no more inclusive word exists in the English language.

Contrary to *Ross*' and its progeny's misreading, the statute is not structured as a broad grant of immunity followed by narrow exceptions. Quite the opposite. The statute begins with provisions setting forth circumstances—highways (§2), vehicles (§5), and public buildings (§6)—where governmental agencies are declared generally liable for tortious injuries, and then provides in §7 a general immunity provision that clearly has no application to situations covered in prior sections. Section 7 is then followed by exceptions to immunity, including proprietary functions (§13), and sewage disposal system events (§§17-19). Properly read and understood, tort liability in connection with highways, vehicles and public buildings is not an "exception" at all, but a first principle, to which general immunity is an exception, with proprietary functions and sewage matters being exceptions to the exception. Thus, the whole concept of generalized immunity with narrow exceptions is exposed as a house of cards, a chimera having no legitimate basis in the actual language or structure of the GTLA itself.

Moreover, without explicit Legislative direction in the statute to accord some provisions primacy over others, the "broad-narrow" construct violates a cardinal rule of statutory construction. As noted in 2A Sutherland, Statutory Construction §46:5 (7th ed.):

\* \* \*when interpreting a statute all parts must be construed together without according undue importance to a single or isolated portion.

The judicial reading of a single piece of legislation, duly enacted into law in accordance with the provisions of the Michigan Constitution of 1963, that accords broad meaning to one provision and narrow meaning to others, when the Legislature itself gave no such direction, violates this basic rule of statutory construction, by elevating one statutory section over others of equal dignity. As former Justice Souter opined in *Arlington Cent School Dist Bd of Educ v Murphy*, 548 US 291, 308; 126 S Ct 2455; 165 L Ed 2d 526 (2006), even separate statutes are of equal

dignity, and courts must not willy-nilly usurp the Legislature's prerogative and elevate one over another by invoking judicially-created preferential rules:

I join Justice BREYER's dissent and add this word only to say outright what would otherwise be implicit, that I agree with the distinction he draws between this case and *Barnes v. Gorman*, 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002). See post, at 2471 (citing *Barnes*, *supra*, at 191, 122 S.Ct. 2097 (SOUTER, J., concurring)). Beyond that, I emphasize the importance for me of §4 of the Handicapped Children's Protection Act of 1986, 100 Stat. 797, note following 20 U.S.C. §1415 (1988 ed.), which mandated the study by what is now known as the Government Accountability Office. That section, of equal dignity with the fee-shifting provision enacted by the same statute, makes Justice BREYER's resort to the related Conference Report the reasonable course.

In rare cases, there may be a common law principle or policy justification to support such interpretive license, for example, taxing statutes are broadly construed and exceptions favoring taxpayers narrowly applied. *Auditor General v R B Smith Mem Hosp Ass'n*, 293 Mich 36, 38-39; 291 NW 213 (1941). This Court has long held that since "(e)xemption from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government (and) (s)ince exemption is the antithesis of tax equality, exemption statutes are to be strictly construed in favor of the taxing unit". *Michigan Baptist Homes & Development Co v Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). See *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1, 7-8; 118 NW2d 818 (1962); *Webb Academy v Grand Rapids*, 209 Mich 523, 536; 177 NW 290 (1920); *St Joseph's Church v Detroit*, 189 Mich 408, 414; 155 NW 588 (1915). " 'Taxation, like rain, falls on all alike. True, there are, in any taxing act, certain exceptions, certain favored classes, who escape the yoke. But one claiming the unique and favored position must establish his right thereto beyond doubt or cavil.' *In re Smith Estate*, 343 Mich 291, 297; 72 NW2d 287 (1955)." *American Concrete Institute v State Tax Comm*, 12 Mich App 595, 607; 163 NW2d 508 (1968). Justice Cooley best summarized the rule of law in his treatise on taxation, cited in most of the foregoing cases:

An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt."

2 Cooley on Taxation (4th ed.), §672, pp. 1403-1404, quoted in *Detroit v Detroit Commercial College*, 322 Mich 142, 148-149; 33 NW2d 737 (1948).

Another similar construct is that remedial statutes are liberally construed and their exceptions narrowly interpreted. *Kempf v Mich Bell Tel Co*, 137 Mich App 574, 583; 358 NW2d 378 (1984), citing *Auten v Unemployment Comp Comm*, 310 Mich 453, 455; 17 NW2d 249 (1945) (unemployment compensation act). In like manner, a statute conferring evidentiary privileges will be narrowly construed and its exceptions broadly interpreted, *People v Love*, 425 Mich 691, 700-701; 391 NW 2d 738 (1986), based on public policy concerns deriving from the common law principle that the law is entitled to every person's evidence. *Trammel v US*, 445 US 40, 50; 100 S Ct 906, 912; 63 L Ed 2d 186 (1980).

With some regularity, the Michigan Legislature provides that a statute shall be broadly construed to achieve certain specified purposes; this is most often found when Michigan adopts a statute promulgated by the Commissioners on Uniform Laws, e.g., MCL 440.1103 (uniform commercial code); MCL 324.1808 (uniform transboundary pollution reciprocal access act); MCL 333.1721(2) (uniform controlled substances act); MCL 400.13 (uniform act regarding transportation of indigent persons); MCL 449.4 (uniform partnership act); MCL 449.2101 (uniform limited partnership act); MCL 552.1107 (uniform interstate family support act); MCL

554.77 (uniform statutory rule against perpetuities); MCL 554.459(a) (uniform gifts to minors act); MCL 557.271 (uniform disposition of community property rights at death act); MCL 565.702 (uniform vendor and purchaser risk act); MCL 566.41 (uniform fraudulent transfer act); MCL 567.261 (uniform unclaimed property act); MCL 600.5861 (uniform statute of limitations for actions accruing outside state); MCL 691.1178 (uniform enforcement of foreign judgments act); MCL 780.45 (uniform rendition of accused persons act); MCL 780.120 (uniform rendition of prisoners as witnesses in criminal proceedings act); MCL 780.152 (uniform reciprocal enforcement of support act).

But absent such common law special cases or express statutory direction, every part of a legislative act is of equal dignity, and must be accorded meaning without artificially elevating one part over another. As the US Supreme Court held in *FTC v Sun Oil Co*, 371 US 505, 528; 83 S Ct 358 ; 9 L Ed 2d 466(1963),

We are not interpreting a broadly phrased constitutional provision, but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions. Compare *Standard Oil Co. of Cal. and Standard Stations v. United States*, 337 U.S. 293, 311—312, 69 S.Ct. 1051, 1060, 1061, 93 L.Ed. 1371.

Another cardinal principle that has been submerged, ignored, or forgotten in the rote application of the misbegotten “broad-narrow” formulation is that, even where a statutory exception is properly subject to a narrow construction, it is error to construe a statute so narrowly as to do violence to the Legislature’s intent. As noted in *Ladies Literary Club v City of Grand Rapids*, 409 Mich 748, 762; 298 NW2d 422 (1980):

Although recognizing that questions of tax exemption are strictly construed, *Webb Academy v Grand Rapids*, 209 Mich. 523; 177 N.W. 290 (1920); *Evanston YMCA Camp v State Tax Comm*, 369 Mich 1; 118 NW2d 818 (1962), we must not construe the instant statute so narrowly as to do violence to the Legislature’s intent. As Justice Cooley wrote in his treatise on taxation:

“When it is said that exemptions must be strictly construed in favor of the taxing power, this does not mean that if there is a possibility of a doubt it is to be at once resolved against the exemption. It simply means that if, after the application of all rules of interpretation for the purpose of ascertaining the intention of the legislature, a well founded doubt exists, then an ambiguity occurs which may be settled by the rule of strict construction. The rule of strict construction does not relieve the court of the duty of interpreting the exemption by the ordinary rules of construction in order to carry out the intention of the legislature \* \* \*. A fair and reasonable construction of the statute or contract must always be adopted, giving the language used its ordinary meaning, and taking into consideration the purpose and spirit of the exemption as well as the public policy entertained at the time \* \* \* when the statute was passed.” 2 Cooley on Taxation (4th ed.), §674, pp. 1415-1417.

It is always error to construe a statute so narrowly as to defeat the manifest Legislative intent.

*Fisher v Gardnier*, 183 Mich 660, 671-672; 150 NW 358 (1915).

Meanwhile, the GTLA must be recognized for what it is—a statute in derogation of the common law. At the time of adoption (1964), Michigan common law, as determined by this Court under its constitutional authority, Const 1963, art 3, §7, was that municipal governments (distinguished from sovereign immunity applicable to the state and its agencies, *Myers v Genesee Co Auditor*, 375 Mich 1, 6-9; 133 NW2d 190 (1965)), had no tort immunity. *Sherbutte v City of Marine City*, 374 Mich 48, 52-54; 130 NW2d 920 (1964); *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961); *Wardlow v City of Detroit*, 364 Mich 291; 111 NW2d 44 (1961). Indeed, 1964 PA 170 was the Legislature’s reaction to that trilogy of decisions.

It is axiomatic that statutes in derogation of the common law will not be construed to abrogate the common law by implication, but if there is any doubt, the statute is to be given the effect that makes the least change in the common law. *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). Such statutes are subject to strict construction. *Wold Architects & Engineers v Strat*, 474 Mich 223, 233–234; 713 NW2d 750 (2006). Indeed, both these principles were expressly cited and cited by the dissenting justices in *Wesche, supra*, 480 Mich at 95 (Weaver and Cavanagh, JJ, dissenting). Thus, it is MCL 691.1407 that is properly

subject to a strict construction, being in derogation of common law, and MCL 691.1402, .1405 and .1406 that, reinforcing common law, are not subject to a narrow construction.

Indeed, when, as here, a statute in derogation of common law contains exceptions, the exceptions are broadly construed with the central provision narrowly interpreted. For example, in *In re Brock*, 442 Mich 101, 119-120; 499 NW2d 752 (1993), this Court addressed construction of MCL 722.631, §11 of the Child Protection Law, in light of the physician-patient privilege, MCL 600.2157. Faced with equally plausible interpretations of §11, one broad and one narrow, this Court held:

We are persuaded by this latter interpretation of § 11. The physician-patient privilege is a statutory creation in derogation of common law, and hence will be narrowly construed. *La Count v Von Platen-Fox Co*, 243 Mich 250; 220 NW 697 (1928); *Yount v Nat'l Bank of Jackson*, 327 Mich 342, 347; 42 NW2d 110 (1950). Exceptions to statutory privileges should be broadly construed. *People v Love*, 425 Mich 691, 700; 391 NW2d 738 (1986). Moreover, the purpose of a child protective proceeding is to protect the welfare of the child. *Gates, supra*, 434 Mich at 161; *In re Baby X*, 97 Mich App 111, 120; 293 NW2d 736 (1980). It is in the best interests of all parties for the factfinder to be in possession of all relevant information regarding the welfare of the child. The trial court determined that the medical information relevant to the petition for jurisdiction would be admissible. We find no error in this decision.

Accordingly, MCL 691.1405 should not be artificially subject to a narrow construction; it is MCL 691.1407 that is properly given a restrictive construction, while MCL 691.1402, .1405, and .1406 should be broadly interpreted because they preserve the common law.<sup>10</sup>

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<sup>10</sup> This Court recognized this issue—that its “broad-narrow” construct for interpreting the GTLA is problematic, and must yield in any event to supervening rules of construction and especially to MCL 8.3a—but skirted resolving it directly, in *Paige v City of Sterling Heights*, 476 Mich 495, 509-510; 720 NW2d 219 (2006), where it held:

Despite the fact that MCL 418.375(2) of the WDCA, at issue in this case, and MCL 691.1407(2) of the GTLA, which was at issue in *Robinson*, both use the phrase “the proximate cause,” Adam argues that the definition of “the proximate cause” from *Robinson* should not be applied to MCL 418.375(2). Adam’s primary argument in support of this assertion is that the GTLA, as a statute in derogation of the common law, is generally said to be strictly construed in favor [footnote 10 continues on next page]

**B. This Court's interpretation of "bodily injury" in *Wesche, supra*, was both artificially narrow, failed to recognize that "bodily injury" was a term of art that had acquired a specialized meaning in the law per MCL 8.3a, and even if correct, was promulgated in a context having no proper application to this case.**

The order granting leave frames the question of damages for pain and suffering and/or emotional distress as controlled by the meaning of "bodily injury" in MCL 691.1405, specifically citing *Wesche, supra*. Here is what this Court said in *Wesche* concerning the meaning of "bodily injury", 480 Mich at 84-85:

Although the GTLA does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." Random House Webster's College Dictionary (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id.* Thus, "bodily injury" simply means a physical or corporeal injury to the body. It is beyond dispute that a loss of consortium is not a physical injury to a body. "A claim for loss of consortium is simply one for loss of society and companionship." *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29; 427 NW2d 488 (1988). Thus, because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity.

Moreover, loss of consortium is not merely an item of damages. Rather, this Court has long recognized that a claim for loss of consortium is an independent cause of action. *Id.*, at 29, citing *Montgomery v Stephan*, 359 Mich 33, 41; 101 NW2d 227 (1960), and Prosser & Keeton, Torts (5th ed.), §125, pp. 931-934. Although a loss-of-consortium

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[footnote 10 continued from previous page] of governmental immunity,<sup>[FN14 omitted]</sup> while the WDCA, being a remedial statute, is generally said to be liberally construed to grant, rather than deny, benefits.<sup>[FN15 omitted]</sup> Although we have stated and utilized these preferential rules of construction in the past, their application is unnecessary in this case because the proper definition of the phrase "the proximate cause" can be ascertained solely by reference to the common meaning of the term "the" and the peculiar meaning that the phrase "proximate cause" has acquired in the law. These preferential rules of construction do not nullify the general rule that statutes should be reasonably interpreted consistent with their plain and unambiguous meaning. See *Northern Concrete Pipe, Inc. v Sinacola Cos-Midwest, Inc*, 461 Mich 316, 320-321; 603 NW2d 257 (1999). More importantly, they do not override the Legislature's clear directive in MCL 8.3a that common words, such as "the," are to be construed according to their common meaning and that words that have acquired a peculiar and appropriate meaning in the law, such as "proximate cause," are to be accorded such peculiar and appropriate meaning.

claim is derivative of the underlying bodily injury, it is nonetheless regarded as a separate cause of action and not merely an item of damages. *Eide, supra* at 37. The motor-vehicle exception does not waive immunity from this independent cause of action; the waiver of immunity is limited to claims for bodily injury and property damage.<sup>FN11</sup>

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<sup>FN11</sup> Justice Kelly asserts that our application of the statutory text will lead to absurd results, but we respectfully disagree, particularly in light of the independent nature of a loss-of-consortium claim. We simply are not convinced that the Legislature's decision to waive immunity only from bodily-injury and property-damage claims, but not for independent loss-of-consortium claims, is absurd.

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That a claim for loss of consortium is an independent cause of action cannot be disputed. The person with a right to file and pursue that claim is not the person directly injured, but the spouse of the injured person. In *Wesche* and almost every other case involving a claim for loss of consortium, the spouse has NOT suffered a bodily injury *no matter how "bodily injury" is defined*. It was utterly unnecessary for this Court in *Wesche* to posit a definition of "bodily injury", as that definition ended up being entirely ancillary to the *ratio decidendi*—loss of consortium claims do not come within the ambit of MCL 691.1405 because the claimant spouse has not suffered a bodily injury in any form known to the English language; the spouse has suffered a legal harm which, since *Montgomery v Stephan*, 359 Mich 33, 41; 101 NW2d 227 (1960), the common law recognizes as generally actionable. So the *Wesche* definition, in addition to being predicated in large part on the erroneous premise that every aspect of MCL 691.1405 was to be given an artificially narrow construction, was *dictum*<sup>11</sup>.

Additionally, in turning at the outset to an ordinary dictionary for definitions of the separate words "bodily" and "injury", this Court perpetrated multiple errors. First, the statute uses those words inseparably, as a complete phrase, "bodily injury" ALSO linked to "liable", so

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<sup>11</sup> It also appears to have overlooked the fact that the key issue had been previously resolved, with the same result, in *Roberts v City of Detroit*, 102 Mich 64, 67; 60 NW 450 (1894), albeit using a completely contrary understanding of "bodily injury".

construing the words individually, and without reference to liability, is contrary to the principle enunciated in *People v Hill*, 486 Mich 658, 678-679; 786 NW2d 601 (2010):

While the Court of Appeals' definition of "makes" has some dictionary support, its analysis was incomplete because it did not consider the statute as a whole and because it did not consider that "makes" should be given a meaning compatible with its surrounding words. When properly construed, the terms "produces" and "makes" are best understood as addressing those who are involved in the creation or origination of child pornography, and not those who download and burn a CD-R of prohibited images for personal use.

Second, dictionaries are merely interpretive aids. *Consumers Power Co v MPSC*, 460 Mich 148, 163 n. 10; 596 NW2d 126 (1999). Third, ordinary dictionaries are wholly inappropriate interpretive aids when the phrase to be defined is one that has acquired a peculiar and appropriate meaning in the law. This cardinal rule of statutory construction has been elevated to a mandatory principle by MCL 8.3a, which provides:

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

"Liability for bodily injury" is just such a phrase<sup>12</sup>.

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<sup>12</sup> The Court of Appeals seemingly agreed with this contention (Apx 5a-6a), but then bollixed its application of the statute by starting its analysis with *Wesche* and compounding its erroneous reasoning with cases dealing with insurance contracts that contained their own definition of "bodily injury" or related qualifications. Such sophistry violates so many logical as well as legal principles—circular reasoning, comparing unlike things, weighing private contractual definitions as controlling the understanding of statutory terminology—as to beggar description. See *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525, 528-530; 502 NW2d 310 (1993).

Similarly, the Court of Appeals, in a disdainful footnote (Apx 6a n. 2), declared that absent an objectively manifested brain injury, emotional distress damages do not flow from physical injury. Apparently, the Court of Appeals takes the position that the law does not recognize that physical injury, particularly an injury that is debilitating and long term, might lead to emotional consequences. With US military personnel, many with no visible injuries, committing suicide at unprecedented rates and "PTSD" a quotidian phrase, this anachronistic view of the connection between mind and body is not just out of fashion, but positively contrary to modern science. Such a dichotomy long ago passed deservedly into the dustbin of history, including Michigan legal history. *Gilson v City of* [footnote 12 continues on next page]

When, in 1964, the Legislature enacted the Governmental Tort Liability Act, “ ‘bodily injury’ damages” had long acquired a settled meaning in the law as *including* mental and emotional distress damages flowing from physical injury. This notion was already settled in 1890, when this Court decided *Sherwood v Chicago & W M Ry Co*, 82 Mich 374, 383-384; 46 NW 773 (1890), a case involving injury alighting from a train, and therein held (emphasis added):

Some question is made upon the charge of the court relative to the measure of damages. But, as it was said by plaintiff’s counsel upon the argument here, a reading of that portion of the charge is the only answer necessary to refute the claims of error. The court charged upon that branch of the case as follows: “In this action, which is a single wrongful act, **the plaintiff**, if she has shown herself entitled to recover, **is entitled to recover all damages which she has suffered** up to the time of trial, and for all damages which it is reasonably probable that she will sustain in the future, not exceeding, in all, the amount claimed in the declaration, and that has been stated to be \$20,000. In estimating the compensatory damages in cases of this character, **all the consequences of the injury, future as well as past, are to be taken into consideration**, including the bodily pain, which is shown by the proofs to be reasonably certain to have naturally resulted from the injury. The injured party, when entitled to recover, should be awarded compensation for all the injuries, past and prospective. These are intended to include and embrace indemnity for actual nursing and medical expenses; also for loss of power, or

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[*footnote 12 continued from previous page*] *Cadillac*, 134 Mich 189, 192; 95 NW 1084 (1903). Compensable tortious “injury” has encompassed pain and suffering, whether of body or mind, for more than a century. *Beath v Rapid R Co*, 119 Mich 512, 514; 78 NW 537 (1899), including municipal liability cases, *Atherton v Village of Bancroft*, 114 Mich 241, 247-248; 72 NW 208 (1897). The Court of Appeals went beyond the Pale in disregarding these controlling authorities. *Boyd v WG Wade Shows, Inc*, 443 Mich 515, 523; 505 NW2d 544 (1993); *Agostini v Felton*, 528 US 203, 237; 117 S Ct 1997; 138 L Ed 2d 391 (1997).

Additionally, the Court of Appeals cited MCL 600.6301 as an exemplar of the Legislature specifying the inclusion of “emotional harm”, and so supporting the notion that such damages are excluded by MCL 691.1405. But MCL 600.6301 defines “personal injury” as “bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm.” Aside from the fact that sickness and disease would not normally be deemed “bodily injury” unless induced tortiously (as by a restaurant serving contaminated food), MCL 600.6301 neither defines “bodily injury” nor even uses the term; nor is it part of the GTLA or even *in pari materia* with the GTLA. Moreover, MCL 600.6301, 1986 PA 178, was enacted 22 years after the GTLA; that gives no insight into what the 1964 Legislature understood or intended, nor can MCL 600.6301 revise or alter MCL 691.1407 by implication. Const 1963, art 4, §25. MCL 600.6301 can hardly provide fodder for understanding terminology it neither employs nor references in any way.

loss of capability to perform ordinary labor, or capacity to earn money, and reasonable satisfaction of physical powers. The elements of damages which the jury are entitled to take into account consist of all effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, the loss of time, all bodily and mental suffering, impairment of capacity to earn money, the pecuniary expenses, the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury; and, **in considering what would be a just sum in compensation for the sufferings or injury, the jury are not only at liberty to consider the bodily pain, but the mental suffering, anxiety, suspense, and fright may be treated as elements of the injury for which damages, by way of compensation, should be allowed.** And as these last-mentioned elements of damage are, in their very nature, not susceptible of any precise or exact computation, the determination of the amount is committed to the judgment and good sense of the jury. And if you find for the plaintiff, such sum should be awarded as will fairly and fully compensate her for all damages which she has sustained consisting of the elements referred to, not exceeding in amount the sum claimed in the declaration." **We see no error in this charge. It is fully supported by the ruling of this court in *Geveke v Railway Co*, 57 Mich 596; 24 NW 675 [1885]; *Power v Harlow*, 57 Mich 116; 23 NW 606 [1885].** (Boldfaced emphasis added.)

The historical treatment of mental distress damages as perfectly allowable when arising from associated physical injury continued unbroken through 1952, when, in *Greenawalt v Nyhuis*, 335 Mich 76, 87; 55 NW2d 736 (1952), this Court thought a contrary argument so bereft of arguable merit as to barely warrant a mention:

Defendants requested the court to charge that plaintiff was not entitled to recover damages for annoyance, discomfiture and humiliation suffered by her as the result of her inability to have her hair dyed or tinted. What is said above with reference to the admission of testimony to which counsel for defendants objected is applicable here. It was the right and privilege of plaintiff to dye her hair if she so desired, and if she was prevented from doing so as a result of the negligence of defendants' employee the question as to the extent of damage thereby sustained was for the jury to determine. The request was properly refused.

Earlier, *id.* at 85-86, the *Greenawalt* Court similarly rejected the argument that admission of evidence of embarrassment and humiliation as a result of plaintiff being unable to continue tinting her hair to conceal its natural gray/white state as jurisprudentially insupportable:

\* \* \* It is the claim of the appellants that the testimony was improperly admitted for the reason that plaintiff's inability to dye her hair was not a proper element of damages. The testimony indicates that plaintiff had followed such practice for approximately 20 years.

That she had the right to do so is not open to question. It was her claim that because of the negligence of Betty Mertz she was prevented from exercising such right, and that she was embarrassed and humiliated in her employment because her hair was white. Appellants' claim that the ruling of the court was erroneous is not tenable.

Recognition of mental anguish as a proper element of damages for associated tortious bodily injury has continued *to expand*, rather than contract. For example, in *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 249-252; 531 NW2d 144 (1995), this Court emphatically rejected the argument that, absent physical injury, emotional damages could not be recovered for wrongful discharge, a type of tort.

It was with this history in mind that the Court of Appeals in *Hannay v MDOT*, 299 Mich App 261, 268-269; 829 NW2d 883 (2013)<sup>13</sup>, observed that for 48 years Michigan courts have routinely awarded damages for mental and emotional injuries under MCL 691.1405:

In this case, defendant does not dispute that the no-fault act provides for the award of economic damages. Rather, now—more than 48 years since the GTLA was enacted,<sup>FN4</sup> during which time economic damages have presumably been routinely awarded—defendant argues that the language of the motor vehicle exception precludes awarding economic damages as provided pursuant to MCL 500.3135(3)(c) because the damages recoverable pursuant to the motor vehicle exception are for the treatment of the bodily injury itself but not the broader damages associated with the bodily injury.

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<sup>FN4</sup> The GTLA was enacted in 1964 and became effective on July 1, 1965.

The only precedential authority that defendant cites that would suggest such a momentous change in the law is the definition of “bodily injury” as a “physical or corporeal injury to the body” that was announced in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 85; 746 NW2d 847 (2008). Applying this definition of bodily injury, defendant argues that the economic damages for work loss and loss of services are not recoverable because the GTLA's motor vehicle exception, MCL 691.1405, waives liability only in regard to bodily injury or property damage as defined in *Wesche*. We conclude that defendant's reliance on *Wesche* in support of its position is misplaced.

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<sup>13</sup> Plaintiff acknowledges that this Court has granted leave in *Hannay* and that it is being argued and submitted at the same session as the present case. But granting leave does not automatically undermine the accuracy or verisimilitude of historical observations contained in the Court of Appeals' *Hannay* decision.

The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the motor vehicle exception. *Wesche*, 480 Mich at 79. Applying a definition of bodily injury as being “a physical or corporeal injury to the body,” the Court held that a loss-of-consortium claim is not recoverable because a loss of consortium is not a physical injury to the body, nor is a loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action. *Id.* at 85.

In this case, it is clear, and defendant does not argue otherwise, that damages for work loss and loss of services are not independent causes of action, but are merely types or items of damages that may be recovered because of the bodily injury plaintiff sustained. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.

Here, likewise, plaintiff Hunter’s claim of mental and emotional damages are merely types or items of damages recoverable because of his undeniable bodily injury. As this Court noted in *Ross, supra*, 420 Mich at 614, “If the Legislature had wished to abolish this rule [whereby “proprietary function” was well understood at the time §13 of the GTLA was enacted] \* \* \* it would have done so in more explicit language.” Likewise, if the Legislature intended to bar liability for mental or emotional distress or pain and suffering under MCL 691.1405, it could easily, and would have, formulated §5 of the GTLA in far more restrictive terms, especially as this Court had previously held that “bodily injury” and “pain and suffering, etc.” were interchangeable. *Roberts v City of Detroit*, 102 Mich 64, 67; 60 NW 450 (1894) (see further discussion of *Roberts* at pp. 33-34 *infra*).

Half a century on, the settled practice, involving contemporary construction of the terminology used in MCL 691.1405 to allow consequential damages flowing from a corporeal injury, and no action by the Legislature to revise that phrasing despite *seventeen* amendments to the GTLA, 1970 PA 155, 1972 PA 28, 1986 PA 175, 1990 PA 278, 1996 PA 143, 1996 PA 150, 1999 PA 205, 1999 PA 241, 2000 PA 318, 2001 PA 131, 2001 PA 222, 2002 PA 400, 2004 PA

428, 2005 PA 318, 2006 PA 244, 2012 PA 50, 2013 PA 173<sup>14</sup>, is suddenly challenged as contrary to the statute—and this revisionist theory was accepted below by a rogue panel of three

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<sup>14</sup> Plaintiff is well aware that this Court has disavowed the “legislative acquiescence” doctrine. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 209 n. 8; 731 NW2d 41 (2001); *Donajkowski v Alpena Power Co*, 460 Mich 243, 258–261; 596 NW2d 574 (1999), quoting *Rogers v Detroit*, 457 Mich 125, 163–166; 579 NW2d 840 (1998) (Taylor, J., dissenting); *Autio v Proksch Constr Co*, 377 Mich 517, 527–539; 141 NW2d 81 (1966); *Van Dorpel v Haven-Busch Co*, 350 Mich 135, 145–149; 85 NW2d 97 (1957), quoting in part *Sheppard v Mich Nat’l Bank*, 348 Mich 577, 599; 83 NW2d 614 (1957) (Smith, J., concurring). But rarely—and certainly not in any of the foregoing cases—has the Legislature revisited a statute 17 times, and nonetheless left prior judicial construction of a basic bit of terminology intact without reasonable people justifiably inferring that the Legislature knew what meaning had been given to “bodily injury” by the judiciary and yet opted not to refine its formulation (note that many of the reasons for inaction hypothesized in *Donajkowski*, *supra*, involve political considerations—viz., that no majority can be put together in the House and Senate, and attract the Governor’s signature, to restrict the scope of damages recoverable, which is really a way of saying that the 48 year long practice was correct, and despite first one political party, then the other, controlling both legislative houses and the governor’s office during the past 50 years, MCL 691.1405 has not had a single word changed. After all, despite repudiating generally the doctrine of “legislative acquiescence”, this Court has continued to espouse the principle that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation.’ *People v Lowe*, 484 Mich 718, 729; 773 NW2d 1 (2009), quoting *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439–440; 716 NW2d 247 (2006). Note also that the related question—the extent of the exception to immunity in MCL 691.1410 for “medical care or treatment” was called to the attention of the Legislature in *McLean v McElhaney*, 289 Mich App 592, 599–600; 798 NW2d 29 (2010), *lv den sub nom McLean v Phenix*, 489 Mich 978; 799 NW2d 14 (2011) (and followed by no legislative action) where the Court of Appeals held:

The plain language of the exception uses the broad phrase “medical care or treatment” and does not contain any language restricting or limiting the exception to medical care or treatment of physical illness or disease alone. If the Legislature had intended to exclude care or treatment for mental illness or disease from the exception, it could have done so by specifically limiting medical care or treatment to care and treatment for physical disease or illness, by specifically excluding care \*600 and treatment for mental conditions, or by defining “medical care or treatment” in such a manner as to exclude care or treatment of mental conditions. The Legislature did not do so. Our obligation to narrowly construe the “medical care or treatment” exception to governmental immunity does not require this Court to ignore the plain and broad language used by the Legislature or the fact that the Legislature chose not to exclude care or treatment for mental health infirmities. “We ‘may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.’ ” *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007), quoting *Roberts v Mecosta Co* [*footnote 14 continues on next page*]

judges. But here, as in *Hannay*, where plaintiff Hunter has suffered actual bodily injury, nothing in MCL 691.1405 purports to limit the items of consequential damages recoverable, so *Wesche* is inapposite, rather than controlling or even relevant.

To begin a proper analysis, the starting point must be the actual language of MCL 691.1405 itself, §5 of the GTLA:

Sec. 5. Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

The City—and now the Court of Appeals—take(s) the unsustainable position that this language bars claims for the mental aspects of physical injury.

To support this tortured misreading of the statutory language, the City and Court of Appeals both rely, first, on *Wesche, supra*, where this Court, after quoting the statute, opined:

This language is clear: it imposes liability for “bodily injury” and “property damage” resulting from a governmental employee’s negligent operation of a government-owned motor vehicle. The waiver of immunity is limited to two categories of damage: bodily injury and property damage.

Although the GTLA does not define “bodily injury,” the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate<sup>15</sup>. *Horace v City of Pontiac*,

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**[footnote 14 continued from previous page]** *Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The absence of any limiting language in the exception suggests a recognition of the interconnectedness of an individual’s physical and mental health, and this Court must not read a limitation into the “medical care or treatment” exception that is not manifest from the plain language of the statute itself. To do so would be tantamount to the establishment of a judicially created exception or

limitation to the “medical care or treatment” exception to governmental immunity that does not exist under the plain and clear language of the statute.

<sup>15</sup> But the phrase “bodily injury” when used in statutes like the no fault act and governmental immunity act reflects a long legal history; hence, a legal dictionary, rather than a “lay dictionary”, would be a more appropriate tool to examine in search of a proper definition. While the Court of Appeals did cite Black’s Law Dictionary, the definition therein is short and supported by scant authority, with no attention given to the **[footnote 15 continues on next page]**

456 Mich 744, 756; 575 NW2d 762 (1998). The word “bodily” means “of or pertaining to the body” or “corporeal or material, as contrasted with spiritual or mental.” Random House Webster’s College Dictionary (2000). The word “injury” refers to “harm or damage done or sustained, [especially] bodily harm.” *Id.* Thus, “bodily injury” simply means a physical or corporeal injury to the body. It is beyond dispute that a loss of consortium is not a bodily injury to a body. “A claim for loss of consortium is simply one for loss of society and companionship.” *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29; 427 NW2d 488 (1988). Thus, because loss of consortium is a nonbodily injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity.

Here, in contrast, plaintiff has suffered a bodily injury, which also happens to be (for no fault tort threshold purposes) “objectively manifested”, in that it was established on the basis of both MRI and EMG studies. That bodily injury consists of a herniated disc at L4-L5, together with epidural lipomatosis surrounding the thecal sac at L5 and S1 level (Exhibit D to Plaintiff’s Resp to MSD). On top of those physical injuries, plaintiff also suffers from bilateral L5 radiculopathy (*id.*, Exhibit E). For present purposes, there is no challenge to the claim that these injuries arose from the collision involving the City’s dump truck<sup>16</sup>, or that the City’s employee was negligent in causing the accident<sup>17</sup>.

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**[footnote 15 continued from previous page]** subsidiary topic of damages. The short-sighted focus on a threshold requirement of physical harm simply fails to address whether consequent emotional or mental damages come within the ambit of *liability* for “bodily injury”, which is what MCL 691.1405 provides. Relying on Black’s is like accepting the answer to a question other than the one of particular interest—see *Estate of Johnson v Kowalski*, 495 Mich 982; 843 NW2d 922 (2014); it does nothing to aid the analysis.

<sup>16</sup> Even if this were properly in issue (see footnote 17 below), plaintiff’s deposition testimony—that for over a year prior to the accident he had no medical problems that prompted him to see a doctor, and that for more than five years he had not sought treatment in any hospital—stands unimpeached and unchallenged. As Sherlock Holmes might have said, when all other possible causes of plaintiff’s herniated disc and other physical injuries have been eliminated and all that remains is the collision, then it must be the latter that correctly explains the causation element.

<sup>17</sup> The City in its motion identified no challenge to the plaintiff’s ability to prove negligence or that the accident was the proximate cause of his injuries, which it was the City’s burden to do before plaintiff was required to even respond. MCR 2.116(G)(4). As held in *SSC Assoc LP v General Retirement Sys of the City of Detroit*, 192 Mich App 360, 367; 480 NW2d 275 (1991):

Defendant was under no obligation to submit affidavits in response to plaintiff’s defective motion. *Jones v Shek*, 48 Mich App 530, **[footnote 17 continues on next page]**

For its part, the Court of Appeals declared (Apx 16a) that “pain and suffering” and “‘shock and emotional damage’ “ “simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.” Yet for over a century this Court has understood exactly the opposite, deeming “bodily injury” on the one hand and “pain and suffering” and related terms like “mental or emotional damage” equivalent and interchangeable:

The plaintiff's case does not fall within the first section (1) because he has no right to recover for the **bodily injury-i.e. pain and suffering, etc.**-of another; (2) because the statute in terms limits the recovery to the person so injured or disabled. (Boldfaced emphasis supplied.)

*Roberts v City of Detroit, supra*, 102 Mich at 67. *Roberts* was both unanimous (Justice Long did not participate) and a governmental immunity case. *Roberts* involved essentially the identical issue to *Wesche*—whether a claim for loss of consortium was one for “bodily injury” under a statute<sup>18</sup> making government agencies liable for defective highways, 3 How St §1446c, which this Court interpreted as limiting liability “to cases of bodily injury”.

Since plaintiff's mental and emotional distress and other damages are the result of his physical injuries, his damages are fully compensable under MCL 600.1405, which does not even use the word “damages”<sup>19</sup>. The only bar to recovery arguably created by MCL 600.1405 and relevant to the present facts is that damages be the result of some bodily injury; here, plaintiff has multiple physical injuries.

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[footnote 17 continued from previous page] 533; 210 N.W.2d 808 (1973); *Bobier, supra*. Plaintiff's failure to file legally sufficient affidavits in support of its motion was fatal to the motion even absent any objection by the defendant. MCR 2.116(G)(3); *Kern v Pontiac Twp*, 93 Mich App 612; 287 NW2d 603 (1979).

<sup>18</sup> The statute addressed in *Roberts* was in derogation of then-common law governmental immunity, and so subject to a narrow construction, notwithstanding which “bodily injury” was given the construction for which appellant here contends.

<sup>19</sup> 3 How St §1446c did use the word “damages” and in *Roberts v City of Detroit* this Court held that meant “bodily injury”. Distinguishing the terminology after previously declaring it fungible is equivalent to amending the GTLA by replacing the lexicon understood and utilized by the enacting Legislature with a new glossary subsequently created by the judiciary.

This was recognized in *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59-60; 760 NW2d 811 (2008)<sup>20, 21</sup>, a case ignored by the City (except for a passing mention in its reply brief in the Court of Appeals), where the Court of Appeals, discussing *Wesche*, held (boldfaced emphasis added):

The Legislature has not defined the words “bodily injury” as used in MCL 691.1405. That is why this Court and our Supreme Court in *Wesche* looked to dictionary definitions for guidance in ascertaining their plain and ordinary meanings. And, unless one reads into both the ruling in *Wesche* and the term “bodily injury” in the statute the requirement that an injury ensue solely from direct trauma, the dissent significantly alters the definition of “bodily injury” in a manner inconsistent with both the plain wording of the statute and our Supreme Court’s interpretation of that term in *Wesche*.

We also note that the dissent appears to concede that indeed plaintiff has an objectively verified brain injury. Its problem seems to be that plaintiff suffered no direct blow to the head, as the cause of the brain injury. Ironically, just a few years ago, the courts in this state had a difficult time understanding and accepting what is now also a universally recognized medical phenomenon and one suffered by thousands of our soldiers: closed head injuries. As we on the bench struggled with how long or whether one had to be rendered unconscious or what tests were sufficient to demonstrate the nature and severity of a closed head injury—including whether MRIs were legally cognizable evidence—the medical community was already a long way down the road in developing treatments and strategies for coping with these mere “mental, emotional,” or “psychiatric” injuries. But as a matter of medicine and law, there should be no difference medically or legally between an objectively demonstrated brain injury, whether the medical diagnosis is a closed head injury, PTSD, Alzheimer’s, brain tumor, epilepsy, etc. **A brain injury is a “bodily injury.” If there were adequate evidence of a brain injury to meet the requisite evidentiary standards, i.e., objective medical proof of the injury, summary disposition was improper.**

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<sup>20</sup> Appeal dismissed, 485 Mich 1118; 779 NW2d 793 (2010).

<sup>21</sup> In the Court of Appeals, the City purported to distinguish *Allen* as involving a traumatic brain injury, which is one type of “bodily injury”. But whether the brain injury is physical (tissue damage) or emotional, the effect is the same, and nothing in MCL 691.1405 purports to make a separation where any type of actual “bodily injury” is established. *Allen*’s reference to TBIs to military personnel is telling; in World War I, GI’s who after extended exposure to combat had a diminished ability to function were said to be “shell shocked”, a malady believed to be purely psychological. By World War II (by which time psychiatry had become a recognized branch of medicine), the terminology changed to “combat stress reaction” or “combat fatigue”, and currently military (and civilian) medicine recognize post-traumatic stress disorder (for those with no visible or medically detectable wounds) along with TBI (resulting from actual bodily injury). Harold Hunter has actual bodily injuries, which should end this discussion without further ado.

In sum, plaintiff here presented sufficient objective medical evidence to raise a material question of fact regarding whether he suffered a brain injury from the accident and whether such brain injury is an injury to the body. Consequently, the trial court erred by granting defendants summary disposition on this issue.

Thus, per *Allen*, once bodily injury is shown, as it has been demonstrated here, compensable damages are only limited by whatever flowed from those bodily injuries, and may include “mere ‘mental, emotional’ or ‘psychiatric’ injuries”. *QED*.

Note that this result is consistent with the treatment of mental injury damages under both Michigan’s ordinary tort jurisprudence as well as the no fault act’s tort liability threshold, MCL 500.3135(1). Since *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970), Michigan has recognized that common-law tort liability for negligently caused physical injury includes emotional distress damages, even where there is no physical impact. Likewise, a plaintiff can recover damages for mental distress when the claim is a statutory action sounding in tort. *Phillips v Butterball Farms Co., Inc (After Second Remand)*, *supra*, 448 Mich at 251.

It has long been understood that “bodily injury” includes mental and emotional damages that arise as a consequence, in whole or in part, of an associated physical injury. In *National Ben Franklin Ins Co v Harris*, 161 Mich App 86, 95; 409 NW2d 733 (1987), the Court held:

Defendants claim that Harris alleged bodily injury in his complaint. In *Farm Bureau Mutual Ins Co of Michigan v Hoag*, 136 Mich App 326, 332, 335; 356 NW2d 630 (1984), lv den 422 Mich 920 (1985), this Court held that the phrase “bodily injury” is unambiguous and does not include humiliation and mental anguish and mental suffering. **As a minimum, this Court held, it would require physical manifestation of mental suffering to satisfy the bodily injury requirement.** *Id.* [Emphasis added.]

In *Greenman v Michigan Mut Ins Co*, 173 Mich App 88, 92; 433 NW2d 346 (1988), the Court summarized *Harris* thusly:

This Court has interpreted the words “bodily injury, sickness or disease” to require at least some physical manifestation of mental injuries. *National Ben Franklin Ins. Co. of Michigan v Harris*, 161 Mich App 86, 90, 409 NW2d 733 (1987).

Those cases were followed by *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 472; 536 NW2d 273 (1995), which held:

Under Michigan law, when mental injury is alleged, at least some physical manifestation of the injury is required in order to bring it within the definition of “bodily injury.” *Greenman v Michigan Mutual Ins. Co.*, 173 Mich App 88, 92, 433 NW2d 346 (1988).

These cases are consistent with this Court’s precedents on the subject, such as *Beath v Rapid R Co, supra*, 119 Mich at 517-518, where this Court opined that mental and emotional damages flowing from corporeal injury are within the scope of what is understood by “bodily injury” (boldfaced emphasis supplied):

It is further contended that the court was in error in charging the jury that they might consider the shame and mortification which the plaintiff had suffered by being obliged to use crutches, or a crutch and cane. We think there was no error in this part of the charge. It was one of the elements of damages which might naturally flow from the injury. **The plaintiff was not confined in her recovery to damages sustained by reason of physical pain and anguish suffered, but had the right to recover for the mental pain and anxiety she was compelled to undergo by reason of the injuries sustained.** If she were compelled to use crutches, or a crutch and cane, that fact was a matter which the jury should take into consideration. While the precise question has not been before this court in the former cases, yet the rules laid down in *Friend v Dunks*, 37 Mich 30; *Ross v Leggett*, 61 Mich 445; 28 NW 695, and *Welch v Ware*, 32 Mich 83, seem to settle the point in controversy against the defendant.

In its April 2, 2013 opinion herein (Apx 13a-16a), the Court of Appeals ruled that MCL 691.1405’s “exception” to governmental immunity for “bodily injury” arising from motor vehicle accidents does not extend to emotional distress damages that flow from a physical injury otherwise within the scope of the exception. The analysis reflected in the Court of Appeals’ opinion conflates the present situation—a physical injury which causes mental suffering and emotional distress—with one in which there is no physical injury at all, but such overwhelming mental injury as to be regarded as equivalent to physical injury. *Toms v McConnell*, 43 Mich App 647, 656-657; 207 NW2d 140 (1973); *Daley v LaCroix, supra*.

Courts in other states have long regarded “bodily injury” as encompassing mental or emotional damages associated with a physical injury<sup>22</sup>. In *Shaw v Freeman*, 134 Conn App 76, 86; 38 A3d 1231 (2012), the Court held that a lawyer’s legal malpractice insurance policy, which excluded coverage for “bodily injury”, excluded claimed emotional distress because such mental damages are a type of “bodily injury”:

The defendant additionally argues that, regardless of whether the plaintiff’s claims emanate from the destruction of property, the court correctly determined that counts three and four of the complaint seeking damages for emotional distress are explicitly excluded by the policy. We agree.

As previously noted, claims for “bodily injury”, which include emotional distress, are excluded from the policy unless they flow from personal injury. Personal injury, in turn, is defined by the policy as “an injury resulting from an act or omission arising out of: false arrest, detention, or imprisonment; wrongful entry, or eviction, or other invasion of the right of private occupancy; libel, slander, or other disparaging or defamatory materials; a writing or saying in violation of an individual’s right to privacy; malicious prosecution or abuse of process.” Since the pleadings do not set forth a claim for personal injury as covered by the policy, the plaintiff’s associated claims for emotional distress fall outside the policy’s coverage. Therefore, the court properly determined that the plaintiff could not pursue her claims for emotional distress and summary judgment was correctly rendered as to counts three and four.

To like effect, in *Brua v Minnesota Joint Underwriting Ass’n*, 778 NW2d 294, 300 n. 2 (Minn, 2010), the Court noted:

“Bodily injury” in the context of the Civil Damages Act has the same meaning as in the general personal injury context. See 4 *Minn. Dist. Judges Ass’n, Minnesota Practice—Jury Instruction Guides, Civil, CIVJIG* 45.55 (5th ed. 2006). Bodily injury damages include compensation for pain, disability, disfigurement, embarrassment, and emotional distress. 4A *Minn. Dist. Judges Ass’n, Minnesota Practice—Jury Instruction Guides, Civil, CIVJIG* 91.10 (5th ed. 2006).

Accord: *Allstate Ins Co v Wagner-Ellsworth*, 344 Mont 445, 451; 188 P3d 1042, 1046 (2008); *State Farm Auto Ins Co v Jakupko*, 881 NE2d 654, 658 (Ind, 2008) to name just a few.

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<sup>22</sup> While there are many cases *appearing*, like *Wessche, supra*, to hold the contrary, on examination all are “bystander recovery” cases, where the actual claimant suffered no physical injury to his or her person underlying the claimed mental or emotional damages, and the only physical injury was to some other person (or to no one).

In *Edinburgh Hosp Authority v Trevino*, 40 Tex S Ct J 313; 941 SW2d 76, 78-79 (Tex, 1997), the Texas Supreme Court faced essentially the identical issue presented here—whether a claim for mental anguish damages was within the scope of a governmental tort immunity statute limiting liability to “property damage, bodily injury or death”. The Court concluded that mental anguish caused by a municipal hospital’s negligence in the stillbirth of plaintiff’s child was a form of “bodily injury” for which immunity was not applicable.

In *Levy v Duclaux*, 324 So2d 1, 10 (La App, 1975), the Court pithily observed:

We are unable to separate a person’s nerves and tensions from his body. It is common knowledge that worry and anxiety can and do have a direct effect on other bodily functions.

Correlatively, of course, as in the present case, the “nerves and tensions” may be a manifestation of the corporeal injury. If tortious negligence causes a victim to become, say, quadriplegic, it would be inconsistent with “one court of justice”, Const 1963, art 6, §1, to say that resulting depression from facing a reduced life expectancy confined to a wheelchair and forever relying on others for dressing, feeding, hygiene, etc. falls outside the scope of compensable “bodily injury”.

Similarly, in the closely related no fault insurance act, MCL 500.3135 preserves tort liability for “serious impairment of body function”, a subspecies of “bodily injury” and thus a *more* restrictive term. Yet almost since the inception of the no fault act, it has been understood and accepted that once the threshold of “serious impairment” is reached, there is no distinction between physical (corporeal) injuries and mental or emotional injuries. *Luce v Gerow*, 89 Mich App 546, 549-550; 280 NW2d 592 (1979). In *Luce*—where the claimant had suffered no physical injury herself, but claimed damages for the shock and distress of seeing her husband injured, 89 Mich App at 551—the Court of Appeals carefully noted that the no fault act’s tort threshold formulation was borrowed from the Uniform Motor Vehicle Accident Reparations Act,

13 ULA 349 *et seq.*, which defined injury in terms of “bodily harm” *inter alia*, terminology understood to make no differentiation between mental and physical harm:

We reject defendant’s contention that the section retaining tort liability on a showing of a certain threshold is limited to physical injuries. An injury to mental well being can be as much an injury to a “body function” as an injury to an arm or a leg. Once it is accepted that mental injuries, with physical consequences, are “real” injuries, defendant’s position becomes unsupportable either in law or in logic. It is clear that under present medical and legal theory, mental injuries are considered just as real as physical injuries. We therefore hold, as a matter of law, that the Legislature did not intend to exclude the possibility of recovering for mental injuries resulting in physical symptoms by using the term “body function” in §3135(1).<sup>[FN2]</sup>

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<sup>FN2</sup> Many of the concepts and most of the theory upon which our No-Fault Act are built come from the Uniform Motor Vehicle Accident Reparations Act (UMVARA), 13 ULA (Master Ed.), p. 349 *et seq.* See, *Pries v Travelers Ins Co*, 86 Mich App 221; 272 NW2d 247 (1978). One of the thresholds for retained tort liability in the Uniform Act is “significant permanent injury”. UMVARA §5(a)(7). Injury is defined in §1(a)(4) of the Uniform Act to include “bodily harm, sickness, disease, or death”. The Commissioners’ comment to this section states:

“This definition is taken from tort liability policy forms and is used throughout the Act to distinguish personal injury from harm to property. These terms do not distinguish between ‘mental’ and ‘physical’ illness.”

Like the Uniform Act, our act should not be interpreted to distinguish between results of a physical injury and results of a mental injury. Both should be compensable once the threshold of “serious impairment of body function” is met.

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his category of injuries may be compensable. Whether a particular plaintiff has sustained a mental or emotional injury which impairs a body function and whether that impairment is serious remain questions for the jury under the cases cited above.<sup>[FN3 omitted]</sup> The trial court erred in dismissing plaintiff’s suit on this basis.

The City has inexplicably asserted that the decision in *Kelly v Builders Square, Inc*, 465 Mich 29; 632 NW2d 912 (2001) lends support to its position. In *Kelly*, this Court merely affirmed—as not inherently inconsistent—judgment based on a jury verdict awarding the plaintiff medical expenses on her tort claim for premises liability, but awarding zero for pain and suffering. What that has to do with the present case remains a mystery Eleusinian in its

xylocephalic unfathomability. This Court in *Kelly* most certainly did not purport to hold, as the City claims, that damages for pain and suffering are legally barred in some circumstances, still less in all cases or in the present situation, which arises under a completely different statutory environment than premises liability. And of course there has been no trial in the present case at which the trier of fact rejected plaintiff's proofs of damages of any kind, physical or mental.

Note the importance of construing the statutory terminology "bodily injury" in accordance with MCL 8.3a. The Legislature has used the phrase "bodily injury" in a plethora of statutes relating to motor vehicles: MCL 29.473(5); MCL 256.629(3)(o), (10); MCL 257.45; MCL 257.401(3); MCL 257.514; MCL 257.520(2), (3)(d) and (e); MCL 257.524(b); MCL 257.1913(2)(a) and (b) (this list may not be comprehensive). In terms of motor vehicle liability insurance requirements ("financial responsibility") and statutory mandates for minimum coverage, as the Court of Appeals correctly observed in *Hannay, supra*, for half a century or more, such terminology has been understood to include mental and emotional distress damages within its ambit. The Court of Appeals' decision in the present case, however, throws those statutes, and the thousands of lawsuits brought under them during 5 decades, into a cocked hat.

The trial court reached the correct result, and its decision should be reinstated.

**C. Considering the purpose of the GTLA, "bodily injury" as used in MCL 691.1405 is properly construed to encompass mental and emotional damages flowing from corporeal injury.**

A cardinal principle of statutory construction, indeed, the "first and foremost" object of the exercise, is to give effect to the Legislature's intent. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004); *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Here, that intent is set forth in the title to the GTLA, as amended:

AN ACT to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, officers, employees, and volunteers thereof, and members of certain boards, councils and task forces when engaged in the exercise or discharge of a governmental function, for injuries to property and persons; to define and limit this liability; to define and limit the liability of the state when engaged in a proprietary function; to authorize the purchase of liability insurance to protect against loss arising out of this liability; to provide for defending certain claims made against public officers and paying damages sought or awarded against them; to provide for the legal defense of public officers and employees; to provide for reimbursement of public officers and employees for certain legal expenses; and to repeal certain acts and parts of acts.

Note that the Legislature did NOT proclaim that its purpose was to insulate government from liability for tortious injury, or to minimize the damages allowed when tort liability obtains. And, as earlier noted, the Legislature did not place the general immunity provision first, but in §7, MCL 691.1407, and ahead of that the Legislature place liability for defective highways, MCL 691.1402, government-owned motor vehicles, MCL 691.1405, and government buildings, MCL 691.1406.

And, as the Legislature was engaged in the task of changing the common law, wherein immunity had been abolished, *Sherbutte, supra*, if it wished to circumscribe liability for, e.g., motor vehicle negligence, it should have specified that it was barring claims for emotional or mental injuries. Instead, it used a term of art, “bodily injury and property damage”—one it had used in a panoply of other motor vehicle-centered statutes— MCL 29.473(5); MCL 256.629(3)(o), (10); MCL 257.45; MCL 257.401(3); MCL 257.514; MCL 257.520(2), (3)(d) and (e); MCL 257.524(b); MCL 257.1913(2)(a) and (b)—as the standard for liability. As such terminology had long been understood, by both courts and the citizenry generally, as encompassing all related damages, including mental and emotional components, the intent to leave the common law liability intact in relation to motor vehicles (as well as defective highways and dangerous buildings) is manifest.

When this Court abrogated common law governmental immunity in *Williams, supra*, Justice Eugene Black's opinion (which created a majority for prospective effect and a majority for abolishing governmental immunity), in his inimitable pithy style summed up the relevant history, 364 Mich at 271-274:

Little time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not 'Should we?'; it is 'How may the body be interred judicially with nondiscriminatory last rites?' No longer does any eminent scholar or jurist attempt justification thereof. All unite in recommendation of corrective legislation. See the trenchant conclusions of Professors Smith FN2 and Lloyd, quoted at conclusion of this opinion. As in *Park v Employment Security Comm*, 355 Mich 103, 141; 94 NW2d 407, the doctrine looks in vain around our conference table for a defender of its once alleged merit. The elder Brethren say only that the rule stare decisis is-by our constitutional schedule-fortified to the impregnable and that this Court upon oath must continue to apply it until the legislature wills otherwise. The provision to which we are referred appears in the margin.

So we enter again upon a perennial controversy: Whether a judge should let others 'long dead and unaware of the problems of the age in which he lives, do his thinking for him.' (Mr. Justice Douglas; 'Stare Decisis'; 49 *Columbia Law Review*, 735, 736). My answer to this question was written in *City of Dearborn v Bacila*, 353 Mich 99, 112; 90 NW2d 863, 870:

'Mr. Justice Holmes, commenting on 'The Path of the Law', leads the thought-way here. He said (Collected Legal Papers, Oliver Wendell Holmes, p. 187):

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

'The late and distinguished Judge Frank (of the 2nd federal judicial circuit) follows the path of Holmes this way:

"Especially are professional or other groups of specialists addicted to set ways. Even the natural scientists, presumably inspired by the spirit of intellectual adventuring, are by no means free of stick-in-the-mudism. The medical profession is almost as much precedent-ridden as the legal. Partly such devotion to past ways involves a sort of ancestor-worship; veneration for one's predecessors is often given as a reason for sticking to precedents. Partly it involves pride: Judges, like doctors and others, are reluctant to admit they made mistakes. Then, too, there is plain old-fashioned animal laziness. It's a nuisance to revise what you have once settled. Out of such laziness comes

what Holmes called ‘one of the misfortunes of the law,’ that ‘ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.’ *Courts On Trial*, by Jerome Frank, Princeton University Press, 1950, pp. 272, 273.’

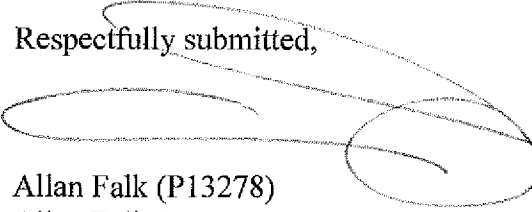
Surely, with the passage of years, today’s question is become a game of quasi-legal basketball with legislators and judges tossing the sphere back and forth with neither making visible effort to loop it for decisive result. It is time one branch or the other act affirmatively and, since the legislature with over-borrowed time has done nothing, this Court should force the issue as other courts have done and are now doing. Then and then only may the people expect what all have a right to expect, that is, prompt if prodded legislation which lifts from the individual the total burden arising from what is now court-licensed negligence and yet reasonably protects the municipality from unbearable diversions of municipal tax revenues. The only alternative is inertia and cozy complacency in our lofty quarters as ‘the rule of law’ burns slowly to utter public disrespect.

When, nearly 3 years later, the Legislature tackled the issue, it did not roll back the clock, or resurrect immunity wholesale. The justification for generalized immunity had been impaled, drawn, and quartered by this Court, and there was no political will for disinterring the discredited corpse. Instead, the Legislature opted to make the law “uniform”, to treat victims of governmental torts fairly without overburdening the taxpayers. Only after carefully identifying three areas in which government tort liability would be only minimally made more uniform did it posit immunity for what remained, and then create exceptions to immunity. There is simply no evidence in the words of the statute to suggest that the liability for motor vehicle negligence was intended to be circumscribed to only corporeal injury damages, with all mental or emotional components of damage or pain and suffering excepted therefrom. Indeed, the Legislature did not even use the word “damages” in MCL 691.1405; it spoke instead of “liability”. Damages are simply the measure of compensation for liability for “bodily injury or property damage”, and such damages, for well over 100 years, embrace the mental and emotional as well as the physical components of injury. *Roberts v City of Detroit, supra*.

### RELIEF REQUESTED

For the foregoing reasons, the trial court ruled appropriately and correctly, reaching the only possible legal conclusion as to each issue, and its decision denying summary disposition should be affirmed. The decision of the Court of Appeals must be correspondingly reversed.

Respectfully submitted,



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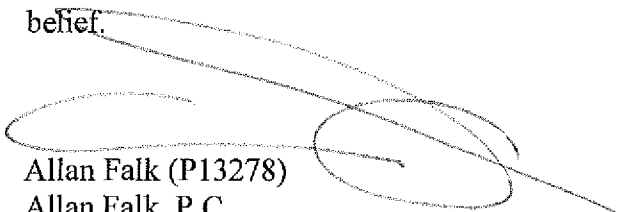
### PROOF OF SERVICE

Pursuant to MCR 7.204(G), Allan Falk certifies that on May 2, 2014, he served two copies each of Plaintiff-Appellant's Brief on Appeal and Appellant's Appendix on opposing counsel by placing same in an envelope addressed to:

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and depositing same with the United States Postal Service, first class postage thereon fully prepaid.

I declare that the statements above are true to the best of my information, knowledge, and belief.



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